National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 7, 1995

TO: Gerald Kobell, Regional Director, Region 6

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Redstone Highlands Health Care Center, Inc. Case 6-CA-27179, 27219, 27241, 27262,

512-5012-6787-8300, 512-5012-8300-5000, 524-5079-2813, 512-5012-6787-3300, 524-5079-2831, 524-5079-2874, 524-8372-5083

This case was submitted for advice as to whether the Employer, which operates a nursing home, violated the Act when it (1) prohibited employees from wearing Union stickers, some of which bore a number representing the days remaining until expiration of the collective-bargaining agreement, and/or (2) permanently replaced employees who participated in an economic strike, after the Union informed the Employer that strikers would be returning to work the following day.[(1)]

FACTS

The Employer operates an intermediate and personal care nursing home. The Service Employees International Union, Local 585 (the Union) has represented the employees at this facility, including nurses, housekeepers, food service workers, and office personnel, since 1990. The most recent collective-bargaining agreement expired on April 12, 1995.

The parties began negotiating a new agreement in February 1995.[(2)]

On March 31, the Union provided a Section 8(g) 10-day notice, stating in a letter to the Employer that the employees would engage in a "strike or picketing or other concerted activities at the Redstone . . . facilities beginning at 5:30 a.m. on Thursday, April 13, 1995."

On April 3, at the request of the Union, several employees wore a fluorescent green sticker approximately the size of a $.50 piece on their uniform or person. Some of these stickers were blank, and others had handwritten numbers representing the number of days remaining before the contract expired. The Employer's Director of Nursing told the employees to remove the stickers, and explained that they were against policy[(3)]

and were upsetting the residents.[(4)]

Employees who continued to wear the sticker were issued disciplinary warnings and, in some cases, suspended. The Employer also reported these employees to the Pennsylvania Department of Health and the Licensing Board for Practical Nurses, under federal and state guidelines prohibiting actions by health care personnel that cause physical or emotional harm to a patient.

On April 11, at the close of a contract negotiation session, the Union handed Employer representatives a letter stating that employees would take a strike vote on the following day, and, if they voted to strike, would strike for approximately 24 hours. The letter further stated that "Striking workers will return to work as scheduled on Friday April 14, 1995, beginning the daylight shift for the respective departments in each facility."

On April 13, the employees commenced striking at 5:30 a.m. Approximately 35 of the 54 employees participated in the work stoppage. Later that day, the Employer notified the Union by fax that it had replaced several employees in response to "both the threatened work stoppage and the work stoppage which began this morning." The fax further stated that, upon receipt of an unconditional offer to return to work, the Employer would review the work schedules of employees and notify them when to

report to work. In response, the Union sent a letter by fax "repeating the unconditional offer to return to work." The Employer responded with a fax acknowledging receipt of the unconditional offer and advising that employees Stock (assistant activities director), Ehrentraut (housekeeping), Kuhns (housekeeping), and Hnatt (office clerical) had been permanently replaced and would be recalled as positions became available. The rest of the employees returned to work on April 14.

The Region has obtained evidence demonstrating that the Employer did not hire permanent replacements for Stock, Ehrentraut, Kuhns, or Hnatt until after the strike began.

The Region has concluded that the Employer discriminatorily chose these employees for replacement, in violation of Section 8 (a)(3), because they were Union activists.

ACTION

We conclude that the Employer violated Section 8(a)(1) by prohibiting its employees from wearing Union insignia, disciplining them for refusing to remove the insignia, and reporting them to the state department of health and nurses' licensing board.(5)

The Employer's maintenance of an overbroad rule regarding insignia, in its personnel policy manual, also violates the Act.(6)

We further conclude that the Employer violated Section 8(a)(3) and (1) when it permanently replaced four strikers after the Union had made an unconditional offer to return to work.(7)

A. The Union Sticker

Employees have a protected right to wear union insignia at work in the absence of "special circumstances."(8)

The Board finds "special circumstances" privileging the banning of union insignia in a health care setting where the employer is motivated by a genuine concern for the health and welfare of its patients, and does not discriminatorily prohibit union insignia while permitting other similar accessories.(9)

In determining whether an employer's prohibition of union insignia was motivated by a genuine concern for the health and welfare of its patients, the Board requires some evidence to support the employer's assertion that patients would be concerned about, or upset by, the insignia.(10)

Thus, in St. Luke's Hospital, the administrative law judge found "special circumstances" in the banning of a "United To Fight For Our Health Plan" sticker, holding that patients could be upset by the implicit message that the employer and its employees were "at odds" with each other.(11)

The Board reversed and found a violation, stating that the "possibility" that patients would be upset did not establish special circumstances where "the record is devoid of any evidence to support [the] supposition" that "patients might be upset by the buttons," and there was "no evidence that any patient complained of, or even noticed, the stickers and buttons at issue in this case."(12)

In Holladay Park Hospital, supra, the Board found a violation in the banning of yellow ribbons worn to demonstrate support for the union's bargaining position, where there was "no evidence that the wearing of these yellow ribbons actually interfered in any way with patient care."(13)

In that case, the Board implicitly rejected the administrative law judge's conclusion that, because of the ambiguity of the plain yellow ribbon, the patients would likely ask employees about their purpose, would thereby be "injected into" the labor dispute, and that effect would be "counterproductive to [their] treatment and recovery. . . ."(14)

Here, the Employer has provided no evidence that the Union stickers had caused, or would cause, patients concern. The message on the stickers was not one intrinsically upsetting to someone depending upon the nursing home for care.(15)

Although patients might be curious about the unexplained numbers and ask employees about them, the Board would not presume, without evidence, that any such discussions would upset patients or interfere with their care.(16)

Thus, the Employer has not shown "special circumstances" privileging its prohibition of Union insignia.

Moreover, the Employer discriminatorily banned Union insignia while permitting seasonal and religious pins to be worn on employee uniforms.(17)

The Board will not find "special circumstances" justifying a prohibition against wearing union insignia if the employer has permitted employees to wear other types of buttons or accessories.(18)

Finally, even if the Board were to find "special circumstances" privileging the banning of the Union stickers in immediate patient care areas,(19)

it is clear that the Employer's prohibition of the insignia in all areas of the facility was overbroad. In Mesa Vista Hospital, the Board found overbroad a rule banning insignia in all areas of the hospital except employee lounges, parking areas, and the cafeteria during scheduled employee meal hours and when no patients were present. The Board held that the employer had not demonstrated an adverse impact on patient care in each area of the facility, other than immediate patient care areas, where the insignia was banned. A health care employer's prohibition of insignia is overbroad unless the employer specifically permits the wearing of insignia in non-patient care areas where it cannot demonstrate an adverse effect on patient care.(20)

B. The Permanent Replacement of Employees

If employees engage in a lawful economic strike, an employer is free to hire permanent replacements.(21)

However, those who have been replaced remain employees within the meaning of the Act, and are entitled to full reinstatement when a vacancy occurs.(22)

Moreover, an employer may hire permanent replacements only until those on strike have made an unconditional request for reinstatement.(23)

Once strikers have made such a request and a vacancy still exists, an employer must permit their return, absent a showing of "legitimate and substantial business justification" for the failure to offer full reinstatement.(24)

Here, the Union told the Employer, before the employees went on strike, that the employees would return to work, according to their regular schedules, the following day. The Union attached no conditions to this return; it was simply an unconditional offer to return the day after engaging in a strike.(25) Thus, when the Employer hired permanent replacements later that day, it was doing so after the unit members on strike had made their unconditional offer to return. The Employer did not lawfully hire permanent replacements, and failed to accord economic strikers their Laidlaw rights by refusing to reinstate them to vacant positions after the strike.(26)

Accordingly, the Region should issue complaint, absent settlement.

B.J.K.

[1] This case was also submitted as to the propriety of Section 10(j) injunctive relief, which will be addressed in a supplemental memorandum.

[2] All dates hereafter are in 1995 unless otherwise noted.

[3] The personnel policy manual provides that employees are permitted to wear professional pins provided by the Employer, but cannot wear any other ribbons, stickers, buttons or insignia. Despite this rule, there is evidence that the Employer has permitted the employees to wear seasonal and religious pins.

[4] The Employer continues to assert that it directed the removal of the stickers because they created fear and apprehension in the patients, and thus interfered with patient care. However, the Employer has presented no evidence that patients were concerned about or upset by the stickers.

[5] With regard to this last violation, see Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 895-97 (1984) (although reporting a violation of the criminal laws is conduct which should otherwise be encouraged, reporting the presence of an illegal alien in retaliation for the employee's protected activities violates the Act; Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), which held that the right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government, is distinguishable because Sure-Tan suffered no legally cognizable wrong and did not invoke the INS process "to seek the redress of any wrong committed against [it]").

[6] See Mesa Vista Hospital, 280 NLRB 298 (1986).

[7] The Region has concluded that, if the Employer unlawfully prohibited the wearing of Union insignia, the strike was an unfair labor practice strike because the Employer's conduct in this regard was a contributing cause of the strike. The Region should argue in the alternative, however, that even if these employees were economic strikers, they were unlawfully replaced.

[8] Republic Aviation Corp. v. NLRB, 324 U.S. 793, 802 (1945); The Ohio Masonic Home, 205 NLRB 357 (1973), enfd. 511 F.2d 527 (5th Cir. 1975).

[9] Holladay Park Hospital, 262 NLRB 278, 279 (1982).

[10] St. Luke's Hospital, 314 NLRB 434 (1994).

[11] 314 NLRB at 439.

[12] 314 NLRB at 436.

[13] 262 NLRB at 279.

[14] 262 NLRB at 283-284.

[15] Compare J.C. Blair Memorial Hospital, Case 6-CA-27228, Advice Memorandum dated August 21, 1995 (Advice dismissed charge that hospital unlawfully required the removal of the words "Safe Staffing" from sticker that read "1199 Will Fight For What Is Right - Health Insurance, Wage Increases, Pension, and Safe Staffing," because the words "Safe Staffing" implied that the employer did not adequately staff the facility and this message was both disparaging and would be upsetting to patients who depended upon the hospital for care).

[16] Holladay Park Hospital, 262 NLRB at 279.

[17] See The Ohio Masonic Home, supra; St. Joseph's Hospital, 225 NLRB 348 (1976).

[18] Holladay Park Hospital, 262 NLRB at 279.

[19] In Mesa Vista Hospital, supra, the Board stated that the banning of union insignia in immediate patient care areas is presumptively valid. St. Luke's Hospital's requirement of probative evidence of interference with patient care, even with regard to the wearing of insignia in patient care areas, would appear to be inconsistent with such a presumption. In St. Luke's Hospital, the Board did not discuss Mesa Vista Hospital or other cases finding such a presumption, and it is not clear whether the Board has sub silentio overruled that principle. In any event, as discussed below, the Employer's conduct here, as in Mesa Vista, violated the Act because its banning of insignia in all areas of the facility, including non-patient care areas, was overbroad.

[20] Holyoke Visiting Nurses Assn., 313 NLRB 1040, 1045-1046 (1994). Cf. Aroostook County Regional Ophthamology Center, 317 NLRB No. 32, slip op. at 1 (April 28, 1995) (employer rule prohibiting discussion of grievances "within earshot of patients" overbroad since it had no limitations as to time and place).

[21] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938).

[22] Laidlaw Corp., 171 NLRB 1366, 1369-1370 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

[23] See Ramada Inn, 201 NLRB 431, 437 (1973) (four hours after start of strike, union sent telegram offering unconditional offer to return to work the following day; employer's permanent

replacement of one employee after receipt of that telegram violated Section 8(a)(3)); Lockwoven Company, 245 NLRB 1362, 1372 (1979) (where striking union made offer to return to work before employer hired replacement, employer violated Section 8(a)(3) by subsequently refusing to reinstate employee); Daniel Construction Co., 264 NLRB 569, 606-607 (1982), enfd. 731 F.2d 191 (4th Cir. 1984) (Act bars employer from hiring permanent replacement after being informed of striker's intent to return to work); Choctaw Maid Farms, 308 NLRB 521, 528 (1992) (same).

[24] NLRB v. Fleetwood Trailer Co., 388 U.S. 375, 378-379 (1967).

[25] The Board does not find a clear offer to return at a specified time in the near future to be conditional. See Ramada Inn, supra, at 436-437; Daniel Construction Co., supra, at 607.

[26] One could also argue that, even apart from the fact that employees had already offered to return to work at the time they were replaced, the Employer violated the Act because it had no legitimate business justification for permanently replacing non-essential employees during such a short strike. However, that argument, which finds support in the principles underlying Mackay Radio & Telegraph Co., supra, NLRB v. Fleetwood Trailer Co., supra, and Great Dane Trailers, 388 U.S. 26 (1967), would require the Board to reexamine its decision in Hot Shoppes, Inc., 146 NLRB 802, 805 (1964) ("We . . . disagree with the Trial Examiner's premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operation of his business. The Supreme Court's decision in Mackay Radio & Telegraph Company, and the cases thereafter, although referring to an employer's right to continue his business during a strike, state that an employer has a legal right to replace economic strikers at will . . ."). See also the Supreme Court's dicta in Belknap, Inc. v. Hale, 463 U.S. 491, 504, n. 8 (1982) (the Board's view as stated in Hot Shoppes, which has not been repudiated by the Board or any decision of the Court, is that returning strikers need not be given preference over permanent replacements even if the replacements were not necessary to keep the business operating); Choctaw Maid Farms, Inc., supra, at 528 (1992) ("[The employer's] state of mind . . . in exercising that right [to hire permanent replacements] is irrelevant"). In view of the clear violation here under Ramada Inn, we have concluded that this case would not be a good vehicle for presenting the argument that employers should not be permitted to permanently replace economic strikers unless they show specific business justification for that decision.